



Handwritten initials and date: *SP*, *E163*, *2063*

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VIA FEDERAL EXPRESS
AND ELECTRONIC MAIL

May 11, 2006

Phyllis Johnson-Ball
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423
Attn: Finance Docket 34797

Re: New England Transrail, LLC
Request for Information on Environmental Impacts
Finance Docket 34797

Dear Ms. Johnson-Ball:

We are writing in response to a letter from Victoria Rutson, Chief, Section of Environmental Analysis ("SEA"), dated April 7, 2006, requesting submittal to SEA by May 12, 2006, of "information on potential environmental impacts, resources or issues concerning" the New England Transrail, LLC ("NET") proposal for a construction, acquisition and operation exemption pending before the Surface Transportation Board as Finance Docket 34797 (the "NET Proposal").

This letter is submitted on behalf of the National Solid Wastes Management Association, the Solid Waste Association of North America and its Massachusetts chapter, the Massachusetts Municipal Association, the Construction Materials Recycling Association, the Integrated Waste Services Association, and New Bedford Waste Services, LLC (the "Coalition Parties").

The Coalition Parties have recently submitted a petition to the Surface Transportation Board (the "Board") requesting that the environmental analysis of the NET Proposal be delayed and that the Board expedite consideration of numerous replies to the NET proposal that raise important jurisdictional questions on the NET Proposal. A number of replying parties have questioned whether the Board has jurisdiction over all or part of the NET Proposal and a Board decision on these issues will allow for either a more efficient environmental review process or will obviate the need for any review process at all. The Board has not acted on the petition for expedited

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consideration as of the date of this letter and the Coalition Parties therefore submit these comments without prejudice to the positions stated in that petition.

Our comments are preliminary by necessity. The NET Proposal is missing key facts necessary to conduct a proper environmental evaluation, an omission that is particularly glaring given that the Board dismissed the prior NET petition for this project on the basis of incomplete environmental information, finding that “NET was not forthcoming”. *See New England Transrail, LLC, Petition for Exemption*, STB Finance Docket No. 34391 (STB served May 3, 2005) at 4-5. As discussed below, we believe that the environmental analysis to date is insufficient and must be significantly enhanced.

I. The Existing EA and Post EA on the Prior NET Proposal are Insufficient.

The National Environmental Policy Act, 42 U.S.C. §4321 *et seq.* (“NEPA”) directs federal agencies proposing ‘major federal actions significantly affecting the quality of the human environment’ to prepare a detailed statement of environmental impacts prior to proceeding with a proposal. 42 U.S.C. §4332(2)(C)(i). NEPA “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989), *cited in Manitoba v. Norton*, 398 F. Supp. 2d 41, 52 (D.D.C., 2005). “This audience includes the public...”. *Id.* at 52.

The courts have determined that an agency must take a “hard look” at the environmental consequences of a decision prior to allowing a project to proceed. *See City of Grapevine v. D.O.T.*, 17 F.3d 1502, 1503-04 (D.C. Cir.), *cert denied*, 513 U.S. 1043 (1994). The proponent will generally conduct an environmental assessment (“EA”) to identify and assess the significance of potential impacts on the environment. However, the EA cannot be used as a substitute for a more substantial Environmental Impact Statement (“EIS”) and is instead intended to help agency officials decide whether an EIS is needed. *See Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985). Where an agency determines that a project may cause a significant degradation of some human environmental factor, an EIS is required. *See State of Louisiana v. Colonel Robert C. Lee, et al*, 758 F.2d 1081, 1084 (5th Cir. 1985); *Foundation for North American Wild Sheep v. U.S. Department of Agriculture*, 681 F.2d 1172 (9th Cir. 1982); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466-467 (5th Cir. 1973). When the determination that a significant effect will or will not result from the proposed action is a close call, an EIS should also be prepared. *National Audubon Soc’y v. Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997).

An EIS is not required only when the reviewing agency can conclude that the proposed action will not have a significant effect on the human environment, or when enforceable mitigation measures would reduce otherwise significant effects to insignificant levels. *Id.* at 13-14. Because neither conclusion is possible in this case, a full EIS is required.

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SEA previously completed an EA, dated August 4, 2004, and a Post Environmental Assessment, dated December 22, 2004 ("Post EA"), on the prior NET application for exemption, STB Finance Docket 34391. The existing EA and Post EA for NET are insufficient to meet the requirements of NEPA for the current pending Petition for Exemption. Those studies were completed for a different NET proposal and a substantively different project. They contain insufficient analysis and lack critical information necessary for the public to properly evaluate the effects of the current NET Proposal.

II. The Board Should Require an EIS For the NET Proposal, And For Most Rail Projects That Involve the Siting of a Facility To Process or Handle Large Quantities of Solid Wastes Outside of Shipping Containers.

The Board's environmental regulations provide that for actions generally requiring an EA, the Board may prepare a full EIS where the probability of significant impacts from the particular proposal is high enough to warrant an EIS. *See* 49 CFR §1105.7(d). Where NET has proposed the construction and operation of a rail facility that will process or handle large quantities of solid wastes outside of shipping containers and under a claim that the facility is exempt from state and local regulation, the proposal presents a very high likelihood of significant effects. A full EIS is therefore required.

This conclusion is particularly clear in the instant case where SEA has previously determined that the Board has a limited ability to impose mitigation that would lessen environmental impacts. Mitigation measures in an EA can be coupled with mandatory conditions and monitoring requirements to reduce environmental effects below the level of significance that would require an EIS. However, in the absence of meaningful mitigation measures with required conditions and monitoring, it is not possible to avoid considering the full range of reasonably foreseeable potential effects. *See National Audubon* at 29.

SEA concluded in its prior review that the construction and operation of the proposed NET facility "is not a matter subject to the Board's regulatory authority" and that "there are limits to the Board's authority to impose mitigation related to the potential environmental effects of operating the reload facility... The Board may not impose mitigation with respect to matters that are outside of its regulatory control." *See* SEA Environmental Assessment, dated August 4, 2004 (Finance Docket No. 34391) at ES-2. Consequently, while the SEA proposed a number of mitigation measures in the EA and Post EA for the prior NET petition, these measures are in large part limited to the project's transportation operations and do not address the most impactful portion of the NET Proposal - the solid waste management activities. Under these conditions, SEA must conduct a full scope EIS review of potential effects.

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A. Congress Has Already Determined that Solid Waste Processing and Handling Have the Potential to Pose Significant Threats.

In the case of solid waste processing and handling, Congress has determined that such management activities pose significant potential threats to human health and the environment if not conducted in a protective and careful manner. In the federal Solid Waste Disposal Act,

“(t)he Congress finds with respect to the environment and health, that ...disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment”;

and

“inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health”. 42 U.S.C. §6901(b).

Consequently, any rail project proposing to site a solid waste facility for purposes of processing or handling large quantities of solid wastes outside of shipping containers should be presumed to create a high probability of significant effects, and environmental review should proceed accordingly.

B. Under the NEPA Regulations, the NET Project Presents a High Probability of Significant Effects.

NET seeks an exemption under 49 U.S.C. §10502 from the formal certificate of public convenience and necessity procedures in 49 U.S.C. §10901, on the basis of a limited scope project involving the construction, rehabilitation and operation of a small section of track. However, from an environmental perspective, the project simply does not qualify as one of limited scope. Instead, it presents a high probability of significant impacts on the human environment and must be reviewed accordingly under NEPA.

The Board is guided by the definition of “significance” adopted in the Council on Environmental Quality (“CEQ”) regulations at 49 CFR §1105.5, which regulations are binding on federal agencies. *See Communities Against Runway Expansion v. F.A.A.*, 355 F.3d 678, 681 (D.C. Cir. 2004). The CEQ has provided guidance to all federal agencies that in the implementation of NEPA, they should, as a general rule, use a broad approach in defining significance. *See* Forty Most Asked Questions, 46 Fed. Reg. 18026 (March 23, 1981). “CEQ’s interpretation of NEPA is entitled to substantial deference.” *Andrus*

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v. *Sierra Club*, 442 U.S. 347, 358 (1979) cited in *Mayaguezanos por la Salud v. U.S.*, 198 F. 3d 297, 301 (1st Cir. 1999).

The CEQ regulations require that the analysis of significance consider potential impacts of a proposed action in terms of both context and intensity. An agency must consider the potential effects of a proposed action from the perspective of society as a whole, the affected region, the affected interests, and the locality. Both short-term and long-term effects are relevant. *See* 40 CFR §1508.27(a). In addition, the agency must evaluate the severity of potential impacts. *See* 40 CFR §1508.27(b).

The CEQ regulations identify, among others, the following factors for analysis. In each case, as described below, there is a high likelihood of significant effect and an EIS should therefore be required to provide the appropriate consideration and evaluation: (i) the degree to which the proposed action affects public health and safety; (ii) the degree to which the effects on the human environment are likely to be highly controversial; (iii) the degree to which the action may establish a precedent for future actions with significant effects; (iv) whether the action is related to other actions that can reasonably be anticipated to have cumulatively significant impacts on the environment, without segmentation; and (v) whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

1. The NET Proposal Will Have A Significant Effect on Public Health and Safety.

(a) There is a high likelihood of significant impact to public health and safety from the operation of municipal solid waste ("MSW") and construction and demolition ("C&D") debris facilities that are not subject to any meaningful public health or safety regulations. The dramatic effects of such facilities, when they are operated without any meaningful regulatory oversight, were evidenced recently in the State of New Jersey and were brought to the attention of the Board by some of the Coalition Parties. *See NSWMA Petition for Declaratory Order*, STB Finance Docket No. 34776, filed October 27, 2005.

In addition, the risks presented by such facilities are described in federal district court filings by the State of New Jersey in *New Jersey DEP and New Jersey Meadowlands Commission v. MHF Logistical Solutions, Inc., et al*, Civ. No. 05-401 (D.N.J. 2005). In that case, the State of New Jersey filed photographs, attached as Exhibit A hereto, depicting shocking operating conditions at several unpermitted and unregulated MSW and C&D debris rail processing sites in New Jersey. The State also filed in that case a declaration, attached as Exhibit B hereto, by Thomas Marturano, Director of Solid Waste and Natural Resources at the Meadowlands Commission, attesting to long term storage of wastes at

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unpermitted sites, a documented fire, serious worker safety issues, discharges of wastes to stormwater and groundwater, filled wetlands, air quality issues, and adverse traffic impacts.

The approval of the NET Proposal may reasonably be expected to lead to similar conditions, especially where, as discussed above, the ability of the Board to place conditions on the project or require mitigation is extremely limited.

Notwithstanding general statements about expected operations by an applicant, without binding commitments and enforceable limitations the only actual limits on operations will arise from physical constraints at the proposed site.

(b) The state and local site assignment process in Massachusetts for solid waste facilities requires that each facility meet specific performance standards to allow both the Massachusetts Department of Environmental Protection and the local board of health to independently determine that the facility will not by itself, or in combination with impacts from other sources, constitute a danger to public health, safety or the environment. *See* G.L. c.111 §§ 150A and 150A½, and 310 CMR §16.40. NET attempts to avoid these requirements, and their attendant costs and burdens, by building its facility along a rail line, claiming that its connection to a rail line provides a safe harbor from state and local permitting.

Where state regulations prohibit the construction or operation of any solid waste facility that fails to meet these standards on the basis that such a facility would not be sufficiently protective of public health and the environment, the Board must include in its review of significant effects an evaluation of the NET Proposal to determine whether the siting standards have been met. If they are not met, the Board must determine the extent to which there will be adverse effects.

The state site assignment performance standards include the following:

310 CMR §16.40(3)(d):

1. The waste handling area cannot be within Zone 1 of a public water supply.
2. The waste handling area cannot be within the interim wellhead protection area or Zone II of an existing public water supply well.
3. The waste handling area cannot be within Zone A of a surface water supply.

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4. The waste handling area cannot be within 500 feet upgradient, or within 250 feet in any other direction, of an existing or potential private water supply well.
5. The waste handling area for a facility receiving more than 50 tons per day must be more than 500 feet from an occupied residential dwelling, a prison, health care facility, elementary school, middle school or high school, children's preschool, licensed day care center, senior center or youth center.
6. The waste handling area cannot be within a Riverfront Area as defined at 310 CMR 10.00.
7. The maximum high groundwater table cannot be within two feet of the ground surface in areas where waste handling is to occur.

310 CMR §16.40(4):

1. The facility cannot be located on land classified as Prime, Unique, or of State and Local Importance by the U.S. Department of Agriculture, or where deemed Land Actively Devoted to Agricultural or Horticultural Uses, or where a 100 foot buffer is not located between the facility and such lands.
2. The facility cannot present traffic impacts that would constitute a danger to the public health, safety, or environment taking into consideration traffic congestion, pedestrian and vehicular safety, road configurations, alternate routes, and vehicle emissions.
3. The facility cannot have an adverse impact on Endangered, Threatened, or Special Concern species listed by the Natural Heritage and Endangered Species Program of the state Division of Fisheries and Wildlife, or on an Ecologically Significant Natural Community as documented by the state Natural Heritage Program, or on the wildlife habitat of any state Wildlife Management Area.
4. The facility cannot be located in a state Area of Critical Environmental Concern, or in an area that would fail to protect the resources of such an area.
5. The facility cannot be located where it would have an adverse impact on the physical environment of, or on the use or enjoyment of, state forests, state or municipal parkland or conservation land, or state Division of Conservation and Recreation reservations, or lands with conservation, preservation, agricultural, or watershed protection restrictions approved by the state, or conservation land

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owned by private non-profit and conservation organizations and open to the public.

6. The facility cannot have anticipated air emissions that would not meet state or federal air quality standards or criteria or would otherwise constitute a danger to public health, safety or the environment, taking into consideration the concentration and dispersion of emissions, the number and proximity of sensitive receptors, and the attainment status of the area.

7. The facility cannot result in nuisance conditions which would constitute a danger to public health, safety or the environment, taking into consideration noise, litter, vermin, odors, bird hazards to air traffic, and other nuisance problems.

8. The facility must be sized to properly operate and maintain the proposed activities. The minimum distance between the waste handling area and the property boundary must be 100 feet.

9. Where an area adjacent to the facility has previously been used for solid waste disposal, certain additional factors must be considered as set forth at 310 CMR 16.40(4)(i).

10. The projected impacts of the facility may not pose a threat to public health, safety or the environment, taking into consideration the impacts of existing sources of pollution or contamination and whether the proposed facility will mitigate or reduce those sources of pollution or contamination.

11. The permitting authority must consider the extent to which the proposed facility provides or affords feasible means to maximize diversion or processing of each component of the anticipated waste stream in order to reduce potential adverse impacts from disposal and utilize reusable materials prior to disposal, and whether the proposed facility will contribute to the establishment and maintenance of a statewide integrated solid waste management system which will protect the public health and conserve natural resources.

(c) The high probability of significant adverse public health and safety impacts from the NET facility has been raised to the SEA and the Board by a large group of commenting parties, including representatives from the host community and direct neighbors to the site. The letters in the environmental correspondence docket for this matter, and in the Board's docket, attest to those impacts, and such letters and the issues they raise are incorporated herein by reference.

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2. The NET Proposal Has Caused, and Will Continue to Cause, Highly Controversial Effects On The Human Environment.

The controversy to be addressed by this factor in the CEQ regulations refers to the existence of a “substantial dispute ... as to the size, nature, or effect of the major federal action”. See *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973). The effects from the proposed facility on the human environment have been, and are likely to continue to be, highly controversial. The voluminous public record on the previous failed notices of exemption filed by NET, and on the current petition, demonstrate the depth of public concern over the NET Proposal, relating specifically to its size, nature and effect.

As SEA notes in its April 7, 2006 letter, “(t)his proceeding generated substantial comment from several members of Congress, a state representative, state and local agencies, consultants, residents and citizen groups.” As of this writing, there are 41 separate parties on the Service List for this docket.

3. The Approval of the NET Proposal is Likely to Establish a Precedent Which Must Be Evaluated For Significant Effects.

If the NET Proposal is approved by the Board, this will signal that waste processing facilities can be built in “regulation-free zones” along rail lines. There will be enormous adverse environmental and public health impacts that will transform the solid waste industry and the communities through which rail lines run. Every community hosting a rail line will face the prospect of unregulated solid waste processing facilities and the attendant impacts as described in the recent cases arising in New Jersey. See Exhibit A and Exhibit B, attached hereto.

Should the NET project be built, there will also be immediate economic pressure on non-rail based solid waste facilities in the region to attempt to reduce costly environmental protections in order to remain competitive or risk going out of business. This would have the potential to cause substantial secondary effects on the populations and host communities for those facilities, which are not served by rail. In addition, there will be an immediate impact on the quality and quantity of raw materials available for processing and for purchase by recycling mills in the region.

The NET Proposal is therefore likely to serve as a precedent for similar projects and a roadmap for other interested parties. The analysis of precedential effect required by the CEQ regulations compels the Board to consider these impacts in the context of other past, pending and reasonably foreseeable future projects. No such analysis has been conducted.

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Consequently, the appropriate NEPA review for the NET Proposal must include the likely impacts on the environment of the propagation of multiple similar facilities in Massachusetts and the New England region, similar to the situation that was found to exist in New Jersey and upon which were based the above referenced NSWMA Petition for Declaratory Order and the State of New Jersey lawsuit in *New Jersey DEP and New Jersey Meadowlands Commission v. MHF Logistical Solutions, Inc.*

4 The Board Must Evaluate Cumulative Environmental Effects.

The NEPA cumulative impact analysis prevents “breaking a proposal into small pieces that, when viewed individually, appear insignificant but that are significant when viewed as a whole.” *City of Oxford v. FAA*, 428 F.3d 1346, 1352 (11th Cir. 2005).

(a) If the NET Proposal is approved, a new avenue for siting and building valuable facilities will have been created, facilities that are capable of offering a waste processing service in a “regulation free zone” at far lower cost than can be offered by legitimate permitted solid waste processing facilities. It is both reasonable and foreseeable to conclude that similar projects will immediately commence along rail lines throughout the Northeast. The analysis of cumulative effects required by the CEQ regulations compels the Board to consider the impacts from such facilities in the context of other past, pending and reasonably foreseeable projects. No such analysis has been conducted.

Consequently, the appropriate NEPA review for the NET Proposal must include the likely impacts on the environment of the propagation of multiple similar facilities in Massachusetts and the Northeast region, similar to the situation that was found to exist in New Jersey and upon which were based the above referenced NSWMA Petition for Declaratory Order and the State of New Jersey lawsuit in *New Jersey DEP and New Jersey Meadowlands Commission v. MHF Logistical Solutions, Inc., et al.*

(b) In accordance with the rulings in *Sierra Club and Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1322 (8th Cir. 1974), the Board must also evaluate the secondary or indirect effects of the NET Proposal, including socio-economic effects.

NET has admitted it does not intend to comply with either the stringent site assignment requirements or the stringent materials separation and recycling requirements to which all similarly situated facilities in Massachusetts are subject

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(see Verified Statement of Robert W. Jones, at 7). Where there is currently an orderly market driven recycling industry in New England that segregates and sells raw materials derived from MSW and C&D debris and that supplies mills situated to receive these inputs, the NET Proposal would allow the diversion of many of these materials, either to different markets or to disposal locations, absent any regulatory controls.

The NET Proposal will clearly cause disruption to recycling programs in Massachusetts and the New England region, both in the short term and the long term. There is also a significant likelihood of increased landfilling as a result of this facility, due to the ability of an operator claiming exemption from the state recycling mandate to pick and choose which materials are recycled based on market pricing.

(c) The NET Proposal would also have a significant and adverse effect on all current legitimately operated and permitted MSW and C&D debris facilities in the region. It is unlikely that existing permitted facilities could effectively compete against facilities that are built without costly pollution controls, state and local permits, operational limitations, or regulatory oversight. There would be adverse employment impacts in the region, and disruption to current recycling markets as supplies of raw recycling feedstock disappear in Massachusetts and the New England region.

(d) The NET Proposal will not be subject to meaningful limits due to the inability of the Board to enforce binding mitigation measures on facility operations. Consequently, there is a high likelihood of segmentation. This is supported by the numerous projections and expectations expressed in NET's Petition, with very few absolutes or limits.

The First Circuit Court of Appeals has determined that where a project proponent could gradually increase the size and impact of its project over time, the cumulative effect of the increases could be major even though no single increase may be significant in itself. *See Save our Heritage v. F.A.A.*, 269 F.3d 249, 259 (1st Cir. 2001). NEPA review must include reasonably expected cumulative impacts absent effective mitigation.

We note that the proposed mitigation measures in the Post EA for the prior NET proposal related predominantly to rail operations and transload activities and did not directly address the risks posed from solid waste processing, handling and storage activities. *See Post EA*, at 1-1 - 1-7. The NET Proposal is clearly susceptible to such segmentation, as the solid waste facility NET proposes to construct will have no enforceable limits on waste receipts, waste processing

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activities, and hours of operation as are customary for all of NET's state and municipally permitted competitors. Consequently, SEA must evaluate the cumulative impacts of construction and operation of the NET Proposal at maximum capacity.

Cumulative impacts from the NET Proposal that require additional study include the following:

- (i) the likelihood that waste handling operations at the NET facility will grow to the maximum physical capacity of the site, which we believe to be far in excess of the quantities predicted for initial operation by NET;
- (ii) the likelihood that traffic, noise, air pollution, and odors will increase to the levels likely for the maximum physical capacity of the site;
- (iii) the likelihood that (a) the environmental protections offered by waste handling operations at competing facilities will change adversely as facility owners attempt to compete with the lower priced (and environmentally risky) operations at the NET facility, and (b) the recycling infrastructure is adversely impacted by the availability of a low cost alternative for far more limited recycling and for increased waste disposal out-of-state; and
- (iv) the likelihood that (a) additional rail-based waste handling facilities will be constructed and operated for unloading, further processing and storage of wastes, with attendant adverse impacts due to the lack of meaningful regulation, and (b) additional quantities of Massachusetts wastes are transported to and deposited in landfills, and the environmental consequences of such further transport and disposal.

5. The NET Proposal Threatens Many Violations of State and Local Environmental Laws.

As the Coalition Parties have presented to the Board previously in this case, the solid waste processing facility proposed by NET does not fall within the Board's jurisdiction and therefore is directly subject to state and local environmental and permitting laws.

NET has declared that its proposal is not subject to most state and local environmental law, and in particular to the state solid waste permitting process, the state and local site assignment process, and the state recycling regulations (*see* Verified Statement of Robert W. Jones, at 7). In making this declaration, NET

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has announced its intent not to comply with the principal substantive environmental protections established by state and local law.

NET has misinterpreted the law and will be in direct violation of a number of requirements if it begins construction of its proposed solid waste facility without the required approvals.

III. There are Significant and Reasonably Foreseeable Indirect Effects That Must Be Analyzed By the Board.

There is a strong potential that the construction and operation of the NET Proposal would cause significant and foreseeable downstream indirect effects and these effects must be considered. The need for an indirect effects analysis was recently addressed in *Mid States Coalition for Progress v. S.T.B.*, 345 F.3d 520, 548-549 (8th Cir. 2003), *rehearing denied* 2004 U.S. App. LEXIS 1506 (8th Cir. Jan. 30, 2004). In that case, the Court of Appeals determined that the Board is required during its NEPA review to consider both the direct and indirect effects of its actions. In *Mid States Coalition*, the indirect effects of extending a rail line included the potential air quality impacts associated with the increased availability and utilization of Power River Basin coal as a result of the new rail line.

A. The Board Must Consider Downstream Impacts On Recycling Industry.

The Board must take into account reasonably foreseeable downstream impacts on the recycling industry from the construction of the NET solid waste processing facility. By avoiding compliance with state mandated recycling regulations, NET will dispose of greater quantities of waste materials, and the adverse impacts of that disposal on the recycling industry and on the level of pollution in society must be evaluated.

As discussed above, a number of rail-based solid waste facilities have recently operated in New Jersey without state and local permits. The Construction Materials Recycling Association, which is one of the Coalition Parties, has witnessed a disruption in recycling markets in both New Jersey and New York as a result of those facilities. The likelihood of this same disruption must be evaluated to determine the environmental and socio-economic effects.

B. The Board Must Evaluate Regional Pollution Impacts From New Facilities.

Current processing and separation of waste materials in Massachusetts and New England occurs in controlled and regulated facilities. The NET Proposal would likely create a new class of unregulated processing facilities at both the shipping and receiving locations, with their attendant impacts. The Board must evaluate the pollution impacts of the foreseeable development of these facilities.

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C. The Board Must Evaluate Pollution Impacts From Facilities That
Need to Adjust Activities To Effectively Compete With Unregulated
Waste Processors.

A waste diversion service provided at a facility subject to no meaningful or costly environmental regulation will have adverse impacts on legitimate solid waste processing facilities, which will need to reduce costs in order to compete on an uneven playing field. Significant pressures will also be placed on host communities that suffer greater environmental impacts as more low cost, low protection facilities are constructed along rail lines to divert material from higher cost protective facilities.

D. The Board Must Evaluate Pollution Impacts On Receiving Facilities,
Host Communities and Landfills.

The shipment of large quantities of wastes out-of-state for disposal will cause pollution impacts on receiving populations, host communities, and landfills in receiving states. As in the case of *Mid-States Coalition for Progress*, the Board must evaluate the extent of pollution controls at distant landfills, and whether they are as protective as those in Massachusetts and the New England region.

Thank you for the opportunity to submit these comments. We urge the Board to require the completion of a full EIS to address the high probability of significant impacts from the NET proposal.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Stephen M. Richmond", with a stylized, looped flourish at the end.

Stephen M. Richmond

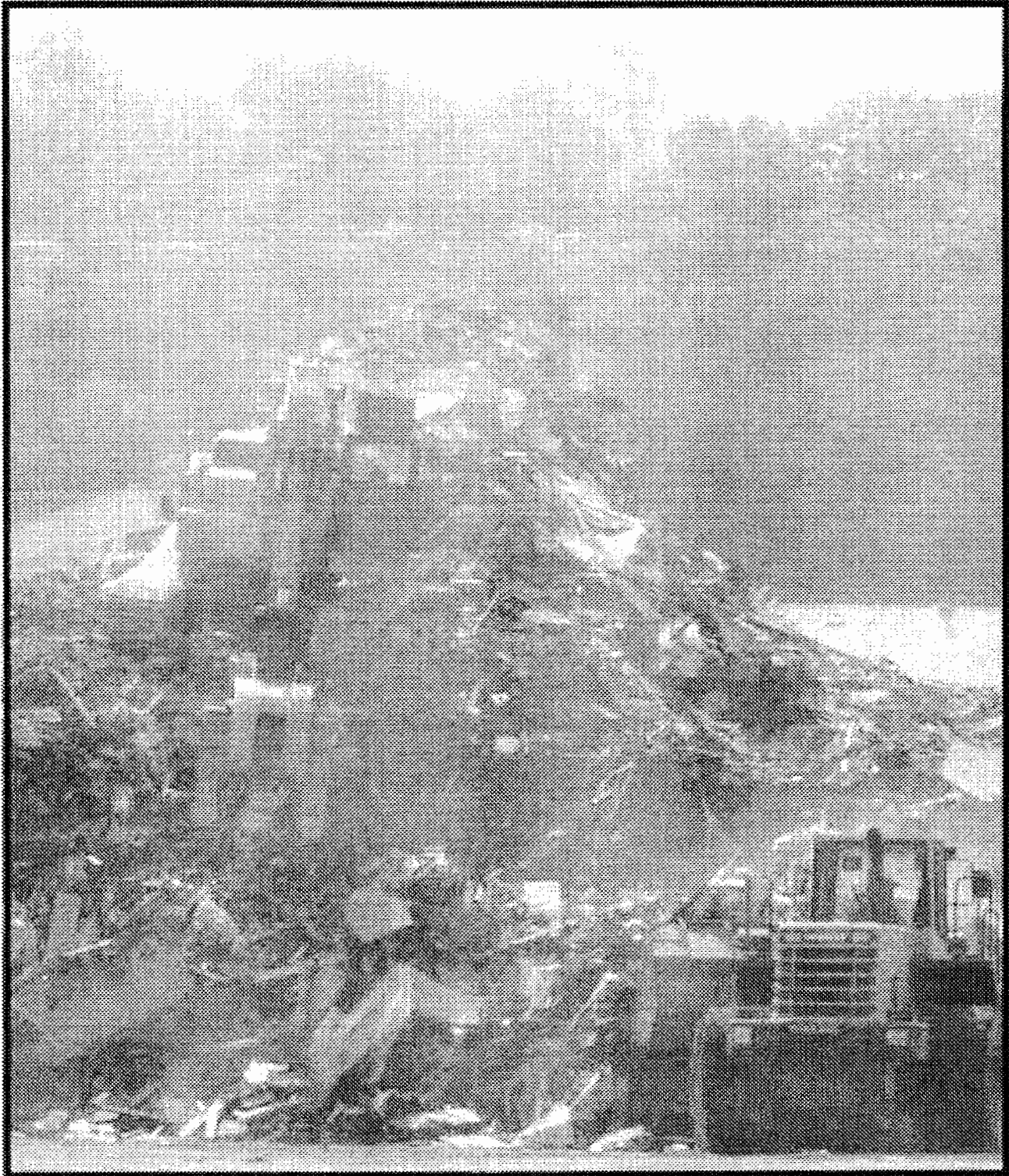
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Enclosures

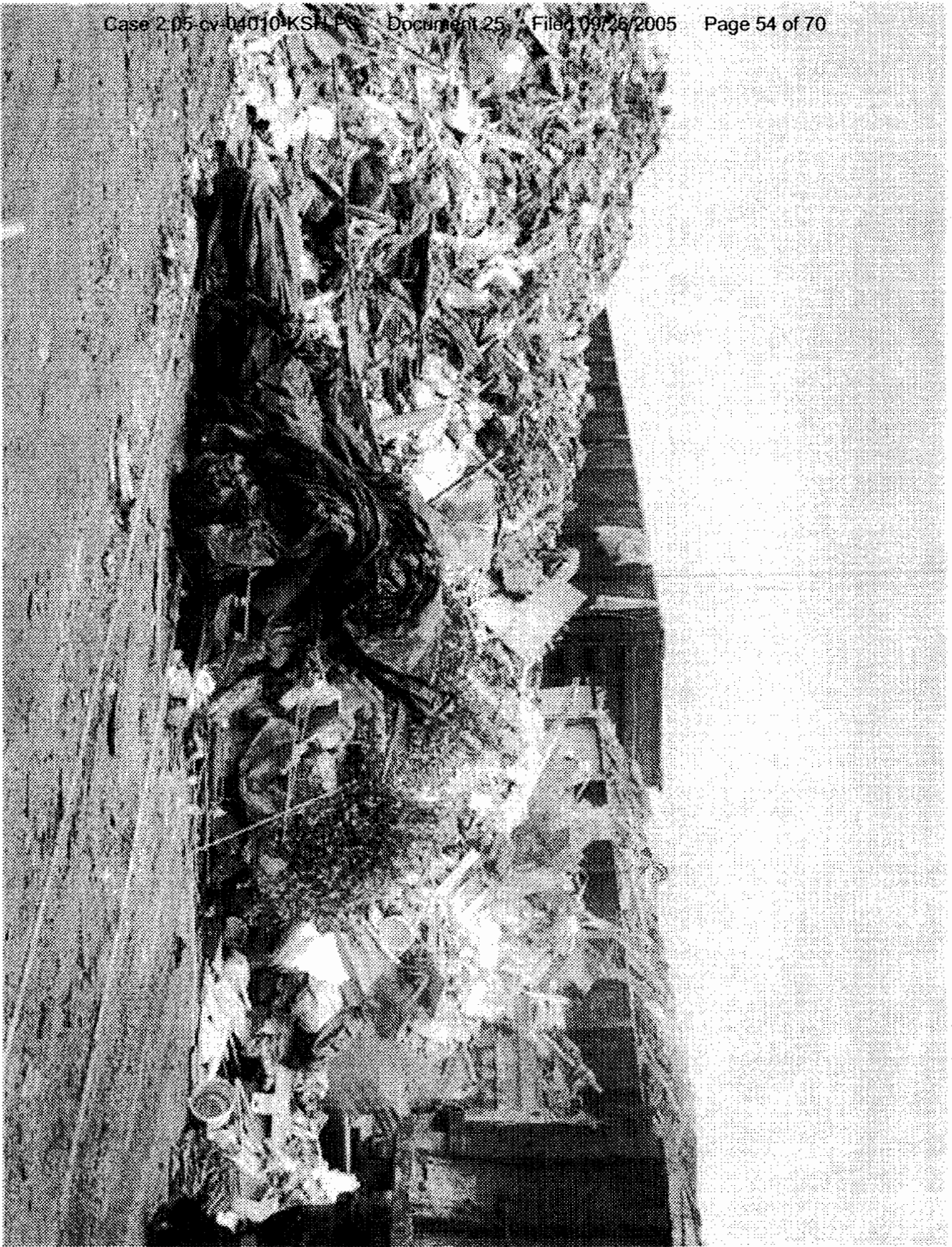
Exhibit A

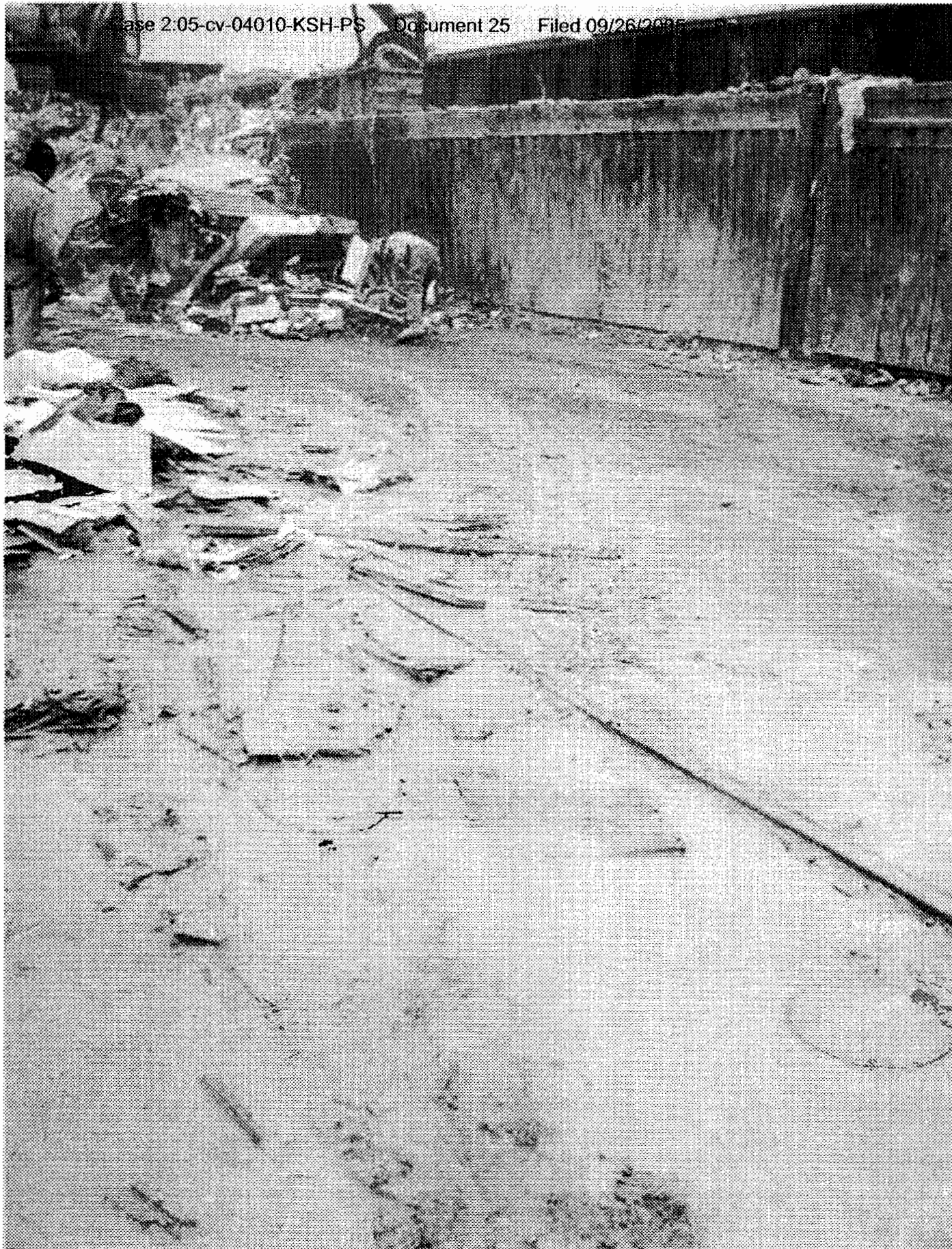
16th Street, North Bergen
December 10, 2004



2200 Secaucus Road, North Bergen
June 15, 2005







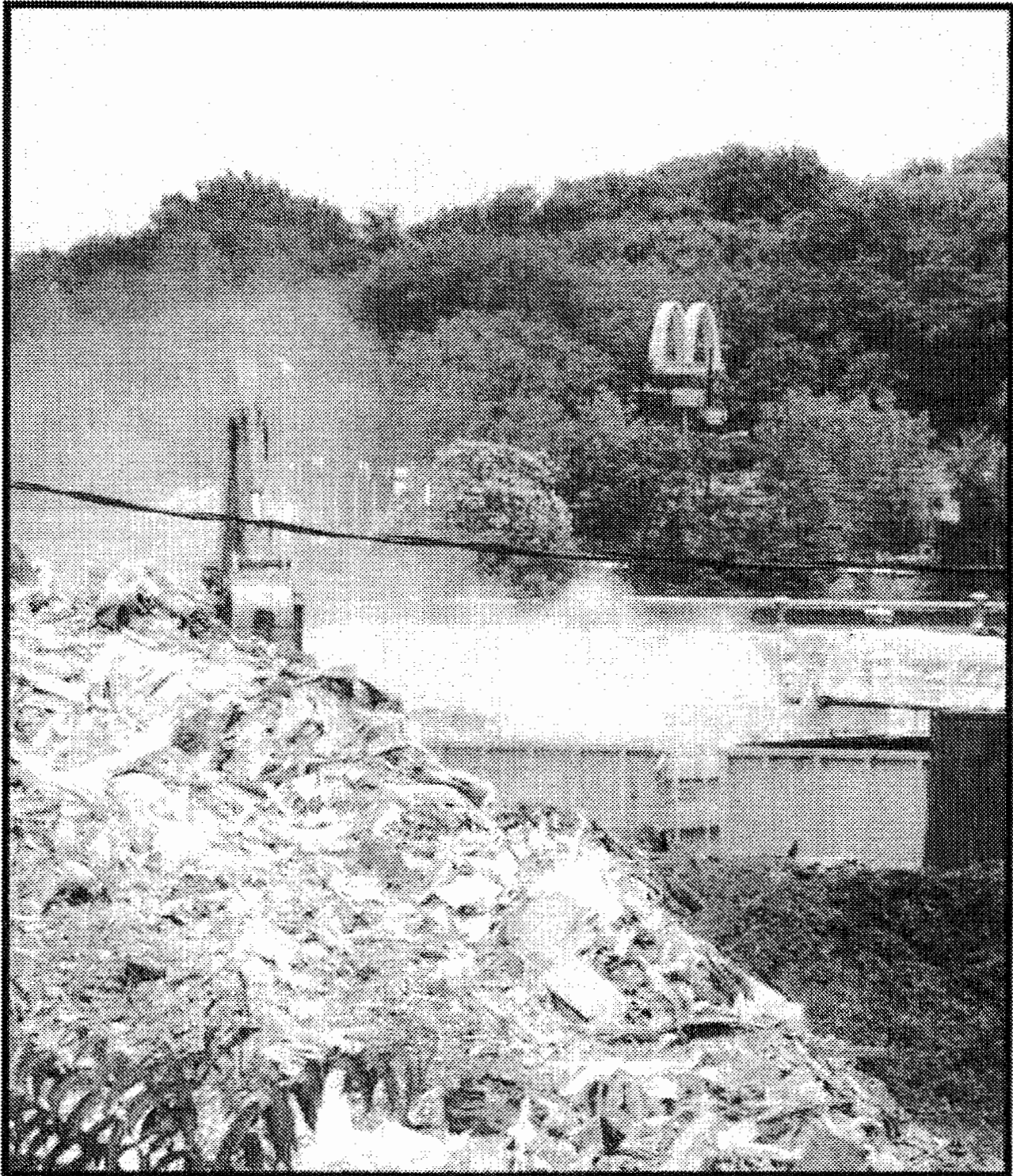






16th Street, North Bergen

June 21, 2005



December 10, 2004



April 2005



Exhibit B

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, New Jersey 08625
Attorney for Defendants/Counterclaimants/Third-Party Plaintiffs
Bradley M. Campbell, in his official capacity as Commissioner
of the Department of Environmental Protection, and
the New Jersey Meadowlands Commission, et al.

By: Kevin P. Auerbacher (KA 9707)
Penny Cirrotti-Ludman (PC 1985)
Deputy Attorneys General
(609) 984-6811

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF NEWARK

NEW YORK, SUSQUEHANNA AND :
WESTERN RAILWAY CORPORATION, :

Plaintiff, :

v. :

BRADLEY M. CAMPBELL, in his official :
capacity as Commissioner of the New Jersey :
Department of Environmental Protection, :
NEW JERSEY MEADOWLANDS :
COMMISSION, et al, :

Defendants/Counterclaimants/ :
Third-Party Plaintiffs, :

v. :

MHF LOGISTICAL SOLUTIONS, INC., :
SLANE RAIL TRANSPORT, LLC, :
PRECISE CONSTRUCTION :

CONTRACTING, INC., RAIL-TECH, LLC, : DECLARATION OF THOMAS MARTURANO
HUDSON-NATIONAL, LLC, CARDELLA : CONCERNING HEALTH AND SAFETY
TRUCKING CO., INC., ONTRACK : VIOLATIONS UNDER NJMC REGULATIONS
LOADING COMPANY, INC., : AND NYS&W'S ENTRY INTO STIPULATION
MILLENIUM RESOURCE RECOVERY, : OF SETTLEMENT WITH NJMC
LTD., X-PRESS RAIL TRANSFER, LLC :
d/b/a 94TH STREET RAIL TRANSFER, :

ELECTRONICALLY FILED
Civil Action No. 05-401(KSH)

LLC., SCOTT EXCAVATING, LLC, :
CROSSROADS RECYCLING, INC., and :
SUSQUEHANNA BULK SYSTEMS, :
Third-Party Defendants.

**DECLARATION OF THOMAS R. MARTURANO IN SUPPORT OF DEFENDANTS'
OPPOSITION TO PLAINTIFF'S REQUEST FOR A PRELIMINARY INJUNCTIVE, AND
IN SUPPORT OF DEFENDANTS' APPLICATION FOR EMERGENCY RELIEF,
INCLUDING EXPEDITED DISCOVERY AND A PRELIMINARY INJUNCTION**

Thomas R. Marturano, P.E., P.P., of full age and duly sworn, certifies as follows:

1. I submit this declaration to explain my observations of the New York Susquehanna & Western Railway ("NYS&W") solid waste facilities' failure to satisfy the requirements of the New Jersey Meadowlands Commission ("NJMC") enabling legislation. I make this declaration in support of the NJMC's opposition to plaintiff's request for a preliminary injunction and also in support of NJMC's counterclaims and request for expedited discovery. I make this declaration based on personal knowledge.

2. I have been employed by the New Jersey Meadowlands Commission ("NJMC") since 1984 and am presently the Director of Solid Waste and Natural Resources. In my capacity as Director of Solid Waste, I am responsible for administering the solid waste management plan and periodically inspecting the included facilities to insure compliance with the plan, and any applicable zoning approvals and NJDEP permits. In addition to my solid waste management plan duties, I am also responsible for the remediation of the almost 600 acres of "orphan" landfills that the Commission has acquired over the years. I am also responsible for administering several vendor contracts or leases for leaf composting, methane gas collection, a type 10 waste transfer station and landfill operator contract. All of these contracts have been in place for more than 10 years.

3. The process of solid waste management planning for the Hackensack Meadowlands District ("the District") is set forth in the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-9, -10, -11, and the Solid Waste Management Act, N.J.S.A. 13:1E-19, et seq. The District is made up of portions of fourteen municipalities in Bergen and Hudson counties. The Solid Waste Management Act created 22 solid waste districts in the state. They are the 21 counties and the NJMC. The District was included with the counties because at the time of the Act we were accepting more than a third of all the waste generated in the state.

4. As shown in the photographs and exhibits submitted to the court on behalf of DEP and NJMC, NYS&W's transload facilities fail to address many basic health and safety concerns addressed by the NJMC's regulations, N.J.A.C. 19:4; -19:6.

5. For example, the operations conducted at four of the five North Bergen facilities, namely, 16th Street, 43rd Street, Secaucus Road and 94th Street, are conducted in the open and not in an enclosed building. Solid waste transporter trucks enter the sites adjacent to NYS&W's rail line and dump or tip solid waste on the ground. At the 43rd Street and Secaucus Road sites, solid waste is dumped into makeshift walled areas created by placing metal shipping containers on top of each other. The solid waste is presumably inspected for unacceptable waste and if found, that waste is segregated for further processing. Some metal and wood is removed for recycling purposes. Some of the waste is compacted or reduced in size prior to transport and then it is pushed into a pile where it is loaded (by a grapple sitting on the pile of waste) into rail cars in the open air. This situation precludes any meaningful determination of the amount of material accepted by each facility, namely, capacity, and further precludes the NJMC from assessing the effect of capacity on infrastructure, traffic, health, safety, and the environment as set forth above. At each of the sites, there is a wall or shipping container between the waste and the railroad car to be loaded. See Exhibits 14, 36, 38 and

39 of Mercado Declaration. Because of this physical configuration, the only way the grapple can reach the entire rail car is if it is sitting on top of a pile of waste as high as the wall. This condition assures that it is almost impossible for the facility to remove all of the waste because waste at the bottom of the pile cannot be lifted over and into the railcar, and also that waste will be stored at the site for an indefinite period of time.

6. The 43rd Street facility does not have adequate space on site for a weigh scale. The site does not contain adequate space to allow for the queuing of vehicles that deliver solid waste to the rail cars. The site only has physical space for a single truck to ingress and egress the loading area which exacerbates traffic both at the facility and on adjacent roadways. Because NYS&W does not provide enough rail cars to handle the solid waste, the material sits on site for lengthy periods of time. This has resulted in at least one fire at the site. This condition would be a violation for any other regulated solid waste facility. As can be seen from the photographs, the "walls" of this facility are constructed out of old shipping containers welded together. There are hundreds of tons stored within these "walls" at any one time yet the physical integrity of these "walls" is not known. The photographs, which show an operator's attempt to reinforce the walls with steel, support the conclusion that there has been a problem with their physical integrity. NYS&W has not submitted information to the NJMC to show that an engineer or architect has designed these walls or that they comply with building codes, yet workers operate heavy machinery on top of the pile and workers and trucks pass within feet of the wall all day long. There is no municipal sewer at the site nor is there any quality or quantity control over the storm water which mixes with the waste and enters the groundwater. There is no room to segregate unacceptable or dangerous waste at the site for removal at a later time.

7. The remaining facilities present similar issues. The 94th Street facility is on a dead end street, has no storm water quality or quantity controls, and is adjacent to a wetland area. Processing of the waste occurs in conjunction with the Class B recycling facility that is adjacent to the facility and operated by the same group of partners. There has been no structural analysis of the "walls" used to contain the waste prior to loading.

8. The facility at the end of 16th Street has filled in wetlands, is located beneath high tension wires (and has shorted them out at least once in the past year), allows wind blown dust and paper to enter adjacent wetland areas, and has no municipal water or sewer service. Additionally, there is very limited truck maneuvering area. There is no quality or quantity control for the storm water, which mixes with the waste and enters the adjacent groundwater. There is no room to isolate unacceptable or dangerous components of the waste that are delivered to the site. There has been no analysis of the walls of this facility to determine if they are safe.

9. The facility whose entrance is on Secaucus Road ("the Slane facility") has had waste piled so high that I have witnessed multiple grapple machines working on the pile passing waste to one another so it can be piled higher and higher. This unsafe practice appears to be necessary because the waste continues to arrive at the facility and is allowed to accumulate on the site even after there are no trains to be loaded. The waste at the core of the pile is often not loaded for weeks and is highly susceptible to a fire. The litter and dust resulting from this site are especially egregious. Like the others, it has no quality or quantity control for the storm water generated at the site.

10. Finally, there is a facility located at 5800 Westside Avenue in North Bergen which receives hazardous soils for shipment out of state. Of particular importance at this site is the fact

that there is no quality or quantity control over the storm water run-off, which has the potential to contain hazardous materials.

11. The information that has been provided to the NJMC does not clearly establish that the NYS&W solid waste facilities are engaged in railroad transportation activities. Should this Court find that the solid waste processing facilities named in this suit are not engaged in transportation activities, they would be required to comply with all state (DEP and NJMC) requirements, and, further, they would be required to apply for inclusion in the District Solid Waste Management Plan ("SWMP"). Engaging NYS&W in the solid waste planning process and Plan inclusion would allow the NJMC to determine the effect of these solid waste operations on the municipality of North Bergen and the District as a whole. It would further allow the NJMC to determine whether (1) NYS&W has sufficient rail cars to move solid waste deposited at its various facilities and where it is ultimately landfilled; (2) there are contingency plans in place in the event that rail cars are unable to use the rails for any reason, including natural disasters, accidents preventing access along the route, strikes, business related concerns such as bankruptcy, and so on. In any of these situations, solid waste could pile up on the sites and remain there for lengthy periods of time unless a suitable back-up plan for moving the solid waste by an alternate means is developed and in place. Finally it would allow NJMC to assess the capacity or amount of solid waste taken in by the facility and its traffic impacts on the local roads and assist the NJMC and NJDEP in addressing safety issues raised by siting of multiple solid waste facilities within a densely populated area.

12. Finally, unlike other facilities in the SWMP, the facilities which are the subject of this litigation do not believe that they are required to collect Origin and Destination forms which tell the facility where the waste comes from and what type of waste it is. This information is necessary for

health and safety reasons. For example, this information is critical in the event of a fire because firefighters need to know the type of waste in the fire.

13. Further, it must be noted that NYS&W agreed under a Stipulation of Settlement it executed in March 2001 to provide the NJMC with "sufficient information for the [NJMC] to ascertain compliance with applicable fire, health, plumbing, safety and construction regulations" and further agreed that it "will comply with all fire, health, plumbing, safety and construction regulations, as applicable." Stipulation of Settlement, ¶¶8; -10. See Exhibit A of Mascaro Declaration. NYS&W specifically agreed to provide information to the NJMC to address a number of the agency's regulations, including NJMC's environmental performance standards, now codified under N.J.A.C. 19:4-7.1 to 7.10. NJMC's performance standards, which are health and safety requirements, include an assessment of traffic impacts of a proposed facility. N.J.A.C. 19:4-7.10. Thus, in the event that the Court determines that NYS&W and its operators are engaged in railroad transportation activities, NYS&W is still bound by the agreements made in the Stipulation of Settlement.

Pursuant to 28 U.S.C. §1746, and under penalty of perjury, I declare that the foregoing is true and correct to the best of my knowledge. Executed on September 21, 2005.


Thomas R. Marturano